

OCT 15 1984

ALEXANDER L. STEVANS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST WALTER HOMENS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE COURT OF
APPEALS OF MARYLAND**

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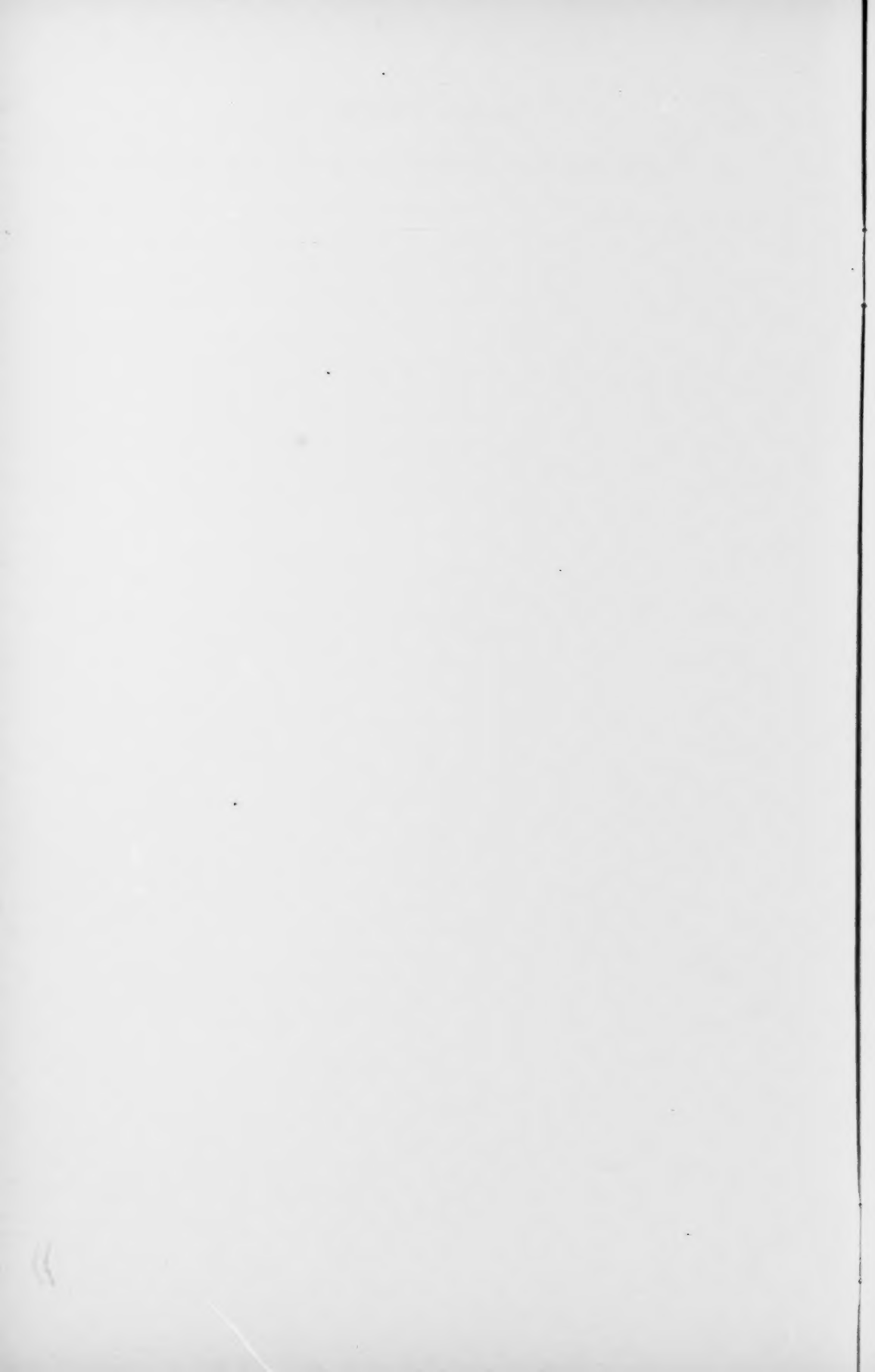
Of Counsel:

JILLYN K. SCHULZE,

Assistant Attorney General.

QUESTION PRESENTED

Should this Court review a question not presented to the State courts?



Misc. No. 83-2104

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PRELIMINARY COMMENT

This brief is filed at this Court's request.

PERTINENT RULE OF PROCEDURE

Maryland Rule 1085. Scope of Review — Limited to

Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

STATEMENT OF THE CASE

Respondent supplements Petitioner's Statement of the Case with the following:

The taking of Petitioner's guilty plea on July 14, 1983, was preceded by the following statement of the terms of the plea agreement:

"COURT: All right. What are we entering a plea to and under what conditions, gentlemen?

[PROSECUTOR] BEARD: Your Honor, it's my understanding that the defendant will enter a plea of guilty to the first count, which alleges distribution of a controlled dangerous substance, specifically Phencyclidine.

Should the Court accept the entry of the plea of guilty to that count, the State has agreed to enter a nolle prosequere to the remaining counts, proceed on a statement of facts. I have agreed that the defendant, if the Court agrees to a PSI and I fully expect the Court to considering the nature of the offense, remain on his personal recognizance pending sentencing. And with respect to sentencing I would have no recommendation.

COURT: Okay. Is that your understanding of everything, Mr. Stack?

[DEFENSE COUNSEL] STACK: Yes, additionally however, the State is agreeing to remain silent on the issue of probation before judgement, should the Court in its wisdom deem that to be an appropriate finding, they would not take a stand for or against but would remain silent.

COURT: All right. They're going to remain silent on everything.

MR. STACK: Yes, Sir.

MR. BEARD: That's correct."

After questioning Petitioner to determine that his plea was voluntary and intelligent, the court asked the prosecutor for a statement of facts. The prosecutor stated that Petitioner sold a quantity of phencyclidine (PCP) to an undercover police officer for \$50 and stated that at one point during the pre-sale negotiations Petitioner told the officer that he was "all out of [PCP] flakes for the time being." Petitioner then disputed the allegation that he made this statement to the undercover officer, and maintained that he did "not want the Court to be left with the impression that he is a habitual dealer in drugs." The court replied "All right. We won't make any determination as to that at the present time." Petitioner then maintained that he was a mere middle man and had not profitted by the transaction. The court opined that this was irrelevant to guilt or innocence but "may be extremely important when we get to the question of sentencing."

When Petitioner appeared for sentencing on September 9, 1983, the State made no recommendation as to sentencing and stood silent while the court and defense counsel discussed at length the relevant sentencing guidelines. Petitioner's counsel called Petitioner to testify that he was not a drug dealer and only became involved in the transaction as a favor for a friend. When the State objected to detailed questioning regarding the transaction, defense counsel reminded the court that "at the time of taking the plea it was agreed between Mr. Beard and myself that ... that the statement of facts was what the State would present, that we didn't necessarily agree with it" and further that "it was agreed at that time we would reserve the right to dispute it at time of sentencing."

After Petitioner testified, the court invited the State to cross-examine him. Counsel for Petitioner did not object to the invitation, did not object to a single question posed by the State, and did not assert that the questioning was in violation of the terms of the plea agreement.

REASONS FOR DENYING THE WRIT

The question Petitioner presents was not raised or decided below. Petitioner failed to object to the cross-

examination and alleged violation of the plea agreement which he now claims denied him due process of law. Accordingly, no State court has ruled on his allegations.¹ It is well settled that this Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Indeed, the Court is without jurisdiction to decide federal questions not raised and decided below. Id. at 438-439; 28 U.S.C. §1257. Accordingly, this Petition must be denied.

The reasons set forth in Cardinale, supra, at 439, for not reviewing questions not presented below are fully applicable here. The record indicates that the state's promise to remain silent at Petitioner's sentencing was merely an agreement not to recommend any particular sentence and not a promise to accept without protest any augmentation of the facts of the offense that Petitioner might present. The absence of an objection to the factual cross-examination meant that there was no opportunity to clarify the State's

¹/While the Maryland Court of Special Appeals did not say why it deemed the application for leave to appeal to be devoid of merit, it is clear that Maryland law requires timely presentation of issues to the trial court in order to preserve them for appellate review. Md. Rule 1085.

promise, if Petitioner felt that such clarification was needed. Therefore, there is no record upon which this Court could review the claimed denial of due process.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied, review being neither desirable nor in the public interest.

Respectfully submitted,

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